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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. ~~375~~ 47

JOSEPH CHARLES USNER
Petitioner

vs.

LUCKENBACH OVERSEAS CORPORATION and
ISTHMIAN LINES, INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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NO.

LUCKENBACH OVERSEAS CORPORATION AND
ISTHMIAN LINES, INC.

vs.

JOSEPH CHARLES USNER

PETITION FOR WRIT OF CERTIORARI TO REVIEW
THE DECISION OF THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Charles Joseph Usner, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 3, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section F, denying defendants' motion for summary judgment, printed in Appendix "G" is unreported.

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section F, amending the order denying defendants' motion for summary judgment, printed in Appendix "F" is unreported.

The opinion of the United States Court of Appeals for the

Fifth Circuit, printed in Appendix "B" is reported at ___F 2d ___.

The opinion of the United States Court of Appeals for the Fifth Circuit in Grigsby, et al, vs. Coastal Marine Service of Texas, Inc., et al, printed in Appendix "C" is reported at ___F 2d___.

No application for rehearing was filed.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) United States Code.

QUESTIONS PRESENTED

(1) Did *Mascuilli vs. the United States* 387 US 237 87 S. Ct. 1705, abolish the defense of operational negligence in an action based on unseaworthiness?

(2) Does operational negligence at the moment of injury render the vessel unseaworthy?

(3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?

JURISPRUDENCE INVOLVED

(1) *Mascuilli vs. the United States,* 387 US 237, 87 S. Ct. 1705.

STATEMENT OF THE CASE

The essential facts of the case are not in dispute and present an incident of operational negligence at the moment of injury.

On September 28, 1964, T. Smith & Sons, Inc., an independent contract stevedore was engaged in unloading a cargo consisting of bundles of steel rods, approximately 50 feet in length from a barge and loading the cargo into the No. 3 hatch of the S/S Edgar F. Luckenbach. The barge was moored along side the vessel; the port and starboard booms at the No. 3 hatch were being used to transfer the cargo from the barge to the vessel. Slings secured to booms, were being used to transport the bundles of rods from the barge into the vessel. The stevedore's employees were using the port winch and boom at the No. 2 hatch to aid in the operation by "breaking out" the bundles before they were lifted from the barge. There function was simply to lift each bundle temporarily so that the slings could be placed on both ends of the rods. Once the slings were secured, the cargo gear at the No. 3 hatch was used to lift the bundle out of the barge and into the vessel.

On the day the plaintiff was injured, he was working on the barge, securing the slings attached to the fall of the "breakout boom" around the cargo. The operation was conducted in this manner and without incident both prior to and subsequent to plaintiff's accident. At approximately 2:30 P.M., the winch operator, operating the No. 2 port winch, lowered the breakout slings just above plaintiff's head and beyond his reach. Plaintiff motioned to the flagman, then standing on the deck of the vessel, to direct the winch operator to lower the sling; the flagman in turn signaled the winch operator. The winch operator then lowered the breakout gear, and in so doing, lowered it too quickly and too far. The gear struck the plaintiff, caused him to fall into the barge and sustain serious and permanent injuries.

On April 27, 1965, plaintiff filed a suit against the defendant claiming benefits pursuant to the General Maritime Law. On July 31, 1967, the defendants filed a motion for

summary judgment alleging that there was no genuine issue as to any material facts and asserting that on the basis of discovery depositions and affidavits all ships gear functioned properly and that if the accident was caused by negligence, that negligence could only have beenthe instantaneous negligence of the longshoremen, which negligence did not render the vessel unseaworthy.

The motion for summary judgment was opposed by plaintiff, asserting that operational negligence as a defense had been obliterated by the Supreme Court of the United States in its per curiam in *Mascuilli vs. the United States*, 387 US 237, 87 S Ct 1705.

On August 11, 1967, defendants motion for summary judgment was denied.

On August 28, 1967, the defendants filed a motion for rehearing of the motion for summary judgment or in the alternative to amend the order denying the motion for summary judgment to permit an interlocutory appeal pursuant to Title 28 of the United States Code, Section 1292 (b).

On August 30, 1967, the District Judge of the United States District Court for the Eastern District of Louisiana entered an order amending the order of August 11, 1967, for the reason that the motion for summary judgment involved a controlling question of law, to wit, " the validity of the doctrine of operational negligence as a defense to which there existed substantial ground for difference of opinion and for which an immediate appeal would materially advance the termination of the litigation."

On October 12, 1967, the defendants were granted leave to appeal from the interlocutory order by the United States Court

of Appeals for the Fifth Circuit. The matter was argued on May 24, 1968, and on July 3, 1969, the United States Court of Appeals for the Fifth Circuit rendered a judgment remanding the matter and directing the District Court to enter the summary judgment.

REASONS FOR GRANTING WRIT

Has the United States Supreme Court rejected the distinction between operational negligence and unseaworthiness? To which of the three questions posed in Mascuilli did the Supreme Court reply affirmatively?

An analysis of the cryptic per curiam in Mascuilli by four of the Circuit Courts of Appeal, in light of the three questions posed in petitioner's brief in Mascuilli and the prior jurisprudence of the Supreme Court has led to the charting of different and distinct courses. The cloud of Mascuilli has resulted in divergent opinons, with the Second and Fourth Circuits rejecting the doctrine of operational negligence as defense to an action based on unseaworthiness, maintining that said defense was rejected by the Supreme Court in Mascuilli, while the Fifth and Ninth Circuits maintained the existence of the defense.

Briefly stated the three issues presented in Mascuilli were:

(1) Did a prior unseaworthy condition come into play by the tight line condition?

(2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

(3) Was the vessel unseaworthy because the longshoremen

were not equal in disposition and seamanship to the ordinary men in the calling?

It is obvious from the opinions rendered by the Fifth and Ninth Circuits that their analysis of Mascuilli led them to the conclusion that the Supreme Court answered the first of the three questions in the affirmative. It is likewise obvious that the Second and Fourth Circuits subscribed to the theory that the second question was answered in the affirmative.

SECOND CIRCUIT REJECTS OPERATIONAL NEGLIGENCE AS DEFENSE

Candiano vs. Moore-McCormack Lines,Inc., 382 F 2d 961 at 962,

> . . .Grillea and a long line of other decisions of this Court attempting to define where operational negligence ends and unseaworthiness begins would seem to be no longer controlling in the light of Mascuilli . . .
>
> In Mascuilli, the question before the Supreme Court on certiorari, to which the Court gave an affirmative answer, was:
>
> "Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"

In *Alexander vs. Bethlehem Steel Corporation*, 382 F. 2d 963, decided on the same day as Candiano,

> This case raises the same issue presented in *Candiano vs. Moore- McCormack Lines, Inc.*, 2 Cir., 382 F 2d 961, also decided today,to wit: Can a ship be rendered unseaworthy solely on account of the negligence of a longshoreman during a loading operation? . . . *in Candiano we recognized that the Supreme Court rejected the distinction between operational negligence and unseaworthiness in Mascuilli vs. United States*, 387 US 237, 87 S Ct 1705, 18 L Ed 2d 743 (US May 22, 1967), and thus an affirmative answer must be given to the question posed above. (Pages 963-964) (Emphasis added)

The Second Circuit again stated its interpretation of Mascuilli in *Cleary vs. United States Lines Company* 411 F 2d 1009,

> It is now clear that a ship is rendered unseaworthy by a longshoreman's negligent use of seaworthy equipment. Candiano vs. Moore-McCormack Lines, Inc., 382 F 2d 961 (2 Cir. 1967).

FOURTH CIRCUIT REJECTS OPERATIONAL NEGLIGENCE AS DEFENSE

Venable vs. A/S Det Forenede Dampskibsselskab, 399 F. 2d 2347. decided on June 12, 1968,

> On this appeal, Venable raises an issue that has proven troublesome to the federal courts: To what extent can the

"operational negligence" alone of a longshoreman or his fellow workers give rise to an action for "unseaworthiness"?. . .

Recently in *Mascuilli vs. United States*, 387 US 237, 87 S Ct 1705, 18 L Ed 2d 743 (1967), the Court was squarely confronted with the necessity of deciding whether a vessel could be rendered unseaworthy solely by the longshoremen's negligent handling of otherwise proper equipment (at 350) . . .

Mascuilli must be read as rejecting operational negligence "as a factor in the determination of liability" (at 351) . . .

It is now settled that the negligent misuse of safe and sufficient equipment renders a vessel unseaworthy. See Waldron vs. Moore-McCormack Lines, Inc., 386 US 724, 87 S Ct 1410, 18 L Ed 2d 482 (1967). *Thus, operational negligence has been subsumed under the doctrine of unseaworthiness.* (Emphasis added)

NINTH CIRCUIT
MAINTAINS OPERATIONAL NEGLIGENCE--A DEFENSE

Tim vs. American President Lines,Ltd., 409 F 2d 385 at 389,

A long line of cases in this Circuit has consistently rejected any doctrine of "instant unseaworthiness." We have held

that liability attaches if an act leaves the vessel in an unsafe condition subsequently resulting in injury but does not if the act and resulting injury are simultaneous. . .

In reviewing Mascuilli the Court stated, at page 390,

> *This decision has created considerable uncertainty in the lower Federal Courts as to whether or not operational negligence constitutes unseaworthiness. (Emphasis Added)*
>
> . . . . Fourth Circuit in Venable vs. A/S Det Forenede Dampskibsselskab, 399 F 2d 347 (4th Cir. 1968), using similar reasoning and relying upon Candiano concluded "that Mascuilli must be read as rejecting operational negligence as a factor in the determination of liability."
>
> "However, we do not believe this to be the meaning of Mascuilli. In the petition for certiorari, Mascuilli did not state that there was simply one question presented for review but rather asserted that there were three. . .

At page 391:

> Our examination and study of Mascuilli's brief in the Supreme Court . . . lead us to conclude that the reversal was predicated upon the Court's answer to the first of the above three questions.

FIFTH CIRCUIT MAINTAINS OPERATIONAL NEGLIGENCE--A DEFENSE

Grigsby vs. Coastal Marine 5th Circuit Court of Appeal No. 22451, (Decided May 1, 1969). Slip Opinion page 43,

> . .in Antoine and Robichaux, this Court rejected categorically the notion of "instant unseaworthiness". . .
>
> With deference to our brothers in the Fourth Circuit we decline to follow their holding in Satchell and that written for the panel by Judge Sobeloff in Venable, that Mascuilli rejects out of hand that so-called "operational negligence" defense to thereby impose absolute liability for the resulting "instant unseaworthiness."
>
> This means that we part company at the same time with our distinguished brothers of the Second Circuit if--and the if can be a big one--the concurring opinion of Judge Leonard P. Moore on rehearing in Candiano and Alexander speaks for the Court in the views which indicate that close analysis of intracircuit undulations, aberrations and enigmas, of his own and other (including the Fifth) Circuits had led him to substantial second thoughts about "instant unseaworthiness."
>
> A number of beacons chart the course in this direction. Foremost, perhaps, *is the unlikelihood of the Supreme Court*

undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement.
(Emphasis Added)

CONCLUSION

Because of the mystery of Mascuilli, the ambiguity of the Supreme Court's opinion, the conflicts among the Circuits and the importance of the clarification of Mascuilli to the entire maritime industry, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

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PROOF OF SERVICE

I, H. Alva Brumfield, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Mr. Maurie Yager
TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL
2141 International Trade Mart Bldg.
2 Canal Street
New Orleans, Louisiana

and

Charles Kohlmeyer
Thomas Thorne
LEMLE,KELLEHER, KOHLMEYER,
MATTHEWS & SCHUMACHER
1800 NBC Building
New Orleans, Louisiana

By mailing a copy thereof, postage prepaid addressed to their respective offices, this day of 1969.

H. Alva Brumfield

APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

October Term, 1967

No. 25344

D. C. Docket No. CA 15531 "F"

LUCKENBACH OVERSEAS CORPORATION
AND ISTHMIAN LINES, INC.,
Appellants

versus

JOSEPH CHARLES USNER,
Appellee

Appeal from the United States Court for the
Eastern District of Louisiana

Before AINSWORTH and SIMPSON, Circuit Judges and SINGLETON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to grant appellants' motion for summary judgment.

It is further ordered that appellee pay to appellants, the costs on appeal to be taxed by the Clerk of this Court.

July 3, 1969

Issued as Mandate:

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25344

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Appellants,

versus

JOSEPH CHARLES USNER,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

(July 3, 1969)

Before AINSWORTH and SIMPSON, Circuit Judges, and SINGLETON, District Judge.

SIMPSON, Circuit Judge: This is an interlocutory appeal from an order denying appellants' motion for summary judgment on a claim based on negligence and unseaworthiness by a longshoreman against appellants as owner and charterer of the S/S EDGAR F. LUCKENBACH. The denial of the motion turned upon a controlling question of law as to which there

was substantial ground for difference of opinion, i.e., the validity of the doctrine of operational negligence as a defense to an unseaworthiness action. The district judge certified the question as one appropriate for interlocutory appeal under Title 28, U.S.C., §1292(b). Upon the district court's certification, this Court allowed the interlocutory appeal.

The sole issue is whether a ship is rendered unseaworthy as a result of the instantaneous negligence of stevedores, this negligence resulting in the injury of another stevedore, when all the equipment and appurtenances aboard the ship are admittedly in a seaworthy condition.

The facts are undisputed. T. Smith & Son, Inc., an independent contract stevedore, was employed to load the appellants' ship with cargo of steel rods approximately 50 feet in length. Slings, secured to booms, were being used to carry bundles of rods from the pier onto the vessel. The slings were lowered into place by the booms, and were attached to the bundles of rods. On the day the plaintiff was injured, the loading operation had proceeded for some time, until on one occasion when the plaintiff was preparing to affix the sling to the rods, he noticed that the lowered sling was just out of his reach. The plaintiff motioned to the flagman to direct the winch operator to lower the slings further. The winch operator then proceeded to lower the slings, but he lowered them too far causing them to strike the plaintiff, knocking him down onto the barge, causing him injury. Neither before nor after the accident was any trouble experienced with

the winch booms, slings, or any other equipment; nor is there any contention that the winches were operated in a systematically negligent manner that would constitute unseaworthiness. The only way in which the vessel could be said to be unseaworthy would be if this one instance of operational negligence on the part of the stevedore operating the winch could be said to constitute unseaworthiness.

The uncertainty and confusion in this area of the law has resulted from the Supreme Court's per curiam opinion in *Mascuilli v. United States*, 387 U.S. 237, decided on May 22, 1967. In its per curiam opinion, the Supreme Court granted certiorari and reversed the judgment of the Third Circuit, citing only two cases: *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959), and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

The district court had held in *Mascuilli*, among other things, that the stevedores had only been instantaneously negligent in handling seaworthy equipment; therefore, the vessel could not be said to be unseaworthy. *Mascuilli v. United States*, D.C.E.D.Pa. 1965, 241 F.Supp. 354, aff'd per curiam, 358 F.2d 133.

The question, then, is whether *Mascuilli* abolished the defense of operational negligence in an action for unseaworthiness. If so, the plaintiff-appellee in the instant case may recover, but if not, recovery is clearly barred since there is no other evidence which would support a finding of unseaworthiness.

Prior to *Mascuilli*, this Court had held in *Antoine* and *Robichaux*,[1] that operational negligence at the moment of injury did not render the vessel unseaworthy. *Mascuilli* raised serious doubt as to the continuing vitality of this holding. That doubt, at least for this Circuit, has been dispelled. "Instant unseaworthiness" resulting from "operational negligence" of the stevedoring contractor is not a basis for recovery by an injured longshoreman. The question is so resolved by our recent decision in *Grigsby, etc. v. Coastal Marine Service of Texas, Inc., et al.*, 5 Cir. 1969, ____ F.2d ____ [No. 22451, May 1, 1969]. See Part VI, pages 35-45, slip opinion.[2]

The district court, upon remand, is directed to grant appellants' motion for summary judgment.

REVERSED AND REMANDED.

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[1] *Antoine v. Lake Charles Stevedores, Inc.*, 5 Cir. 1967, 376 F.2d 443, cert. denied, 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146; *Robichaux v. Kerr McGee Oil Indus., Inc.*, 5 Cir. 1967, 376 F.2d 447.

[2] See also *Tim v. American President Lines*, 9 Cir. 1969, ____ F.2d ____ [No. 22,395, March 18, 1969].

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APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22451

HAZEL JEAN GRIGSBY, WIDOW OF JOHN D. GRIGSBY, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR CHILDREN, JAVAN K. GRIGSBY AND JENNIFER ANN GRIGSBY,

Appellee,

versus

COASTAL MARINE SERVICE OF TEXAS, INC., MARYLAND CASUALTY COMPANY, GULF SALT CARRIERS, INC., F. E. AIPLE d/b/a AIPLE TOWING COMPANY, FIDELITY & CASUALTY COMPANY OF NEW YORK, WELDERS SUPPLY COMPANY OF LAKE CHARLES, LOUISIANA,

Appellants.

OLIN MATHIESON CHEMICAL CORPORATION,

Intervenor-Appellee.

Appeals from the United States District Court for the Western District of Louisiana

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(May 1, 1969)

Before BROWN, Chief Judge, BURGER* and WISDOM, Circuit Judges

PART IV
PAGES - (35-45) SLIP OPINION
INCORPORATED BY REFERENCE

VI.

UNSEAWORTHINESS OF THE BARGE

The Shipowner, Aiple, sharply attacks the finding of the Trial Judge that the Barge was unseaworthy. As discussed in Part V it also contends that even though the Barge was unseaworthy, no right of recovery exists under the Louisiana death statute for non-negligent unseaworthiness.

---

[23]See The Tungus v. Skovgaard, 1959, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, 1959 A.M.C. 813; Holly v. S.S. Manford Stonefield, 4 Cir., 1959, 269 F.2d 317; Union Carbide Corp. v. Goett, 4 Cir. 1960, 278 F.2d 319, 1960 A.M.C. 1119; Maryland ex rel Smith v. A/S Nabella, D.Md., 1959, 176 F.Supp. 668, 1959 A.M.C. 2196; Vassallo v. Nederl-Amerik Stoomv Matts Holland, Tex., 1961, 344 S.W.2d 421. See also Weed v. Bilbrey, Fla. Ct. App., 1967, 201 So.2d 771, 774 n. 2, *reversed*, Fla., 1968, 215 So. 2d 749.

[24]Florida is a surprising exception, since its survival statute speaks in terms of "libels in rem", a maritime, not local, concept. See Moragne v. State Marine Lines, Inc., Fla., 1968, 211 So.2d 161. Article 2315 does not contain an in rem provision. However, Louisiana statutes allow proceedings in rem against an "offending vessel" "where any injury, loss or damage is caused or occasioned within the territorial jurisdiction of the State of Louisiana to the person or property of any person by carelessness, neglect or want of skill in navigation, direction or management of any vessel. . . ." La. R. S. 34:802, 803 (1950).

The findings of the District Court on unseaworthiness may be briefly paraphrased. On the arrival of the Barge at the Olin dock, she was listing noticeably to starboard because of the unusual and abnormal accumulation of water in the No. 2 starboard wing tank. This tank is designed to provide buoyancy to the Barge and should, therefore, contain no water. Inspection revealed that there was 2'3" of water in this tank. In this condition the Barge was not reasonably fit to carry the cargo of sodium nitrate which she had undertaken to transport. Moreover, the hatch cover wings to the No. 2 starboard wing tank were corroded and sealed tightly. The wing tank contained some carbon monoxide and was oxygen deficient to the extent that those who entered lost consciousness. No inspection of the tank had been had since December 9, 1961. On this, the Court found the Barge to have been unseaworthy.

On this finding of unseaworthiness, it was, of course, a perfectly natural and inescapable conclusion that since this condition caused Grigsby to lose consciousness and drown in the accumulation of water in the No. 2 starboard wing tank, the unseaworthiness was a proximate cause of his injuries and death.

This matter of unseaworthiness of the Barge poses somewhat unusual problems. In our analysis, however, we are aided if we dispose of positions at each extreme which are simply untenable with respect to the peculiar circumstances of this case. It is well to reemphasize here that the duty of seaworthiness arises because Grigsby had the vicarious status of a seaman — either as one engaged in life salvage or, as a

corollary, one engaged in the Good Samaritan rescue of Sonnier and Morgan, each of whom admittedly were doing repair work, the traditional work of seamen to thus become vicarious seamen themselves. The point of significance is, therefore, that it was the presence of the water in the wing tank and the consequent list to the Barge which was the sole occasion for the three of them to be aboard the Barge at the time and under the circumstances presented. We may assume that with this list the Barge was unseaworthy *vis a vis* the cargo and the shipper of cargo. But there is no warranty that the vessel is seaworthy with respect to the unseaworthy condition which is directly responsible for bringing aboard the persons claiming the benefit of the warranty. We agree with the Second Circuit in *McDaniel v. The M/S Lisholt*, 2 Cir., 1960, 282 F.2d 816, 1961 A.M.C. 25:

> "We need pause only briefly with libelant's assertion that he was entitled to a warranty of seaworthiness. The short answer is that the contention was disposed of by this Court's prior decision, since we do not read the Supreme Court's opinion as disapproving our ruling on this issue. As we there stated, 'There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness.' 2 Cir., 257 F.2d 538, 540. See also West v. United States, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161; Filipek v. Moore-McCormack Lines, Inc., 2 Cir., 258 F.2d 734, certiorari denied 359 U.S. 927, 79 S.Ct.

605, 3 L.Ed.2d 629; Bruszewski v. Isthmian S.S. Co., 3 Cir., 163 F.2d 720, certiorari denied 333 U.S. 828, 68 S.Ct. 451, 92 L.Ed. 1113."

The same may be said, we think, with respect to another extreme — the oxygen deficiency of the tank (or the presence of carbon monoxide gas presumably resulting also from the natural process of oxidation). A wing tank is to supply buoyancy. It was supplying buoyancy although it also produced a list. The wing tank is not present or designed for the purpose of safely carrying men. A wing tank is expected to be kept closed. As a compartment intended to be tightly closed and sealed for long periods of time, it is expected that there will likely be an oxygen deficiency which itself makes it dangerous for tank entry unless precautions are taken.

Consequently, if confined precisely to the particular reasons given by the Trial Court we would have much doubt that they would sustain the holding of unseaworthiness.

On the other hand, the Shipowner's effort to press the literalism of *West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161, 1960 A.M.C. 15, must fail here just as it did recently in *Lusich v. Bloomfield S.S. Co.*, 5 Cir., 1966, 355 F.2d 770, 1966 A.M.C. 191. It would, to be sure, be a nice day for shipowners if under a bareboat charter of a manned vessel or a charter of almost any kind of an unmanned vessel, the owner could absolve itself of all of the traditional obligations of furnishing a seaworthy vessel merely be-

cause the owner was not in the physical possession and control of the craft and, on the contrary, the possession and control was in the hands of the charterer. Obviously, of course, the absence of possession and control may well insulate the shipowner from a liability in personam in the absence of conduct which somehow implicates the remote owner in the deficiency.[35] But on principles of *in rem* liability, or concepts akin to it, there seems to be no more reason for the physical absence of an owner's representative universally to insulate the vessel from accountability for personal injuries occasioned by unseaworthiness than there is to absolve the vessel from *in rem* liability for, say, other types of maritime torts including collision, even though the vessel, on this hypothesis, is wholly in the control of a demise charterer and, worse, being conned by a compulsory pilot.[36]

Thus, in *West*, had the vessel been in the regular course of operation under a demise charter from the United States (her owner), to a private company as bareboat charterer, and had the claimant sustained

---

[35] There are, of course, circumstances in which *in rem* liability will also be lacking for want of requisite control. See Moye v. Sioux City & New Orleans Barge Lines, Inc., 5 Cir., 1968, ——— F.2d ——— [No. 23018, Oct. 9, 1968].

[36] Griffin, *Collision*, §244, at 553 (1949):

"Thus a vessel is liable *in rem* for collision, although she is under demise charter and the master and crew are therefore the charterer's servants * * *."; 1 Benedict, *Admiralty*, §132, at 362-63 nn. 63, 64 (1940); Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 1900, 182 U.S. 406, 21 S.Ct. 831, 45 L.Ed. 1155; The China, 1868, 74 U.S. (7 Wall.) 53, 19 L.Ed. 67. *Cf.* Reed v. The Yaka, 1963, 373 U.S. 410, ——— S.Ct. ———, ——— L.Ed.2d ———, 1963 A.M.C. 1373.

his injuries from a condition other than that being repaired, we have no doubt that liability at least on principles *in rem* would have existed and would have been enforceable against the government under the Public Vessels Act, 46 U.S.C.A. §§781-90. We, therefore, decline, with deference to pursue the literalism of the Fourth Circuit in *Union Carbide Corp. v. Goette*, 4 Cir., 1960, 278 F.2d 319, 1960 A.M.C. 1119, *cert. denied*, 364 U.S. 826, 81 S.Ct. 64, 5 L.Ed.2d 55.[37] The principle of *West* does not therefore extricate the Shipowner as it hopefully urges.

As the facts which give rise to this inference are virtually without dispute and rest almost altogether on other fact findings having the buoyancy of F.R.Civ. P. 52(a), we think it appropriate for us to affirm the finding of unseaworthiness although on a different ground. The unseaworthiness here is not the antecedent condition of the Morton Salt Barge #2, either upon arrival

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[37] Following trial after remand from the Supreme Court, see note 13 *supra*.

We do not put in the same class the decision of Judge Ainsworth, then District Judge, in Hurst v. Point Landing, Inc., E.D. La., 1962, 212 F. Supp. 160, 162. Although the opinion discusses the absence of control, the opinion and decision, however, correctly analyze *West* in terms of the reason for the vessel undergoing repair and the presence of the injured person aboard at the time of the occurrence. "There is no doubt that the Barge was unseaworthy; this was the reason for its being at the Avondale wet dock, that is, for the removal of the condition which caused it to become unseaworthy —the defective hatch cover which was not fully closed. It would be manifestly unfair to penalize a shipowner for performing his duty and taking the necessary steps to make his ship seaworthy. * * * The primary reason for libelant being aboard the Barge was the performance of his duties to Avondale * * *."

at Olin's dock, or at the time Coastal's men started to perform their engagement. Here the unseaworthiness is confined narrowly to that point of time commencing with Sonnier's undertaking to go into the wing tank. The tank entry was done with the full knowledge of Coastal's representatives. Indeed, it was done to effectuate Coastal's work — the discharge by portable pump of the water accumulated in the wing tank. Obviously the tank was not safe for men at that time, either actually or under applicable safety regulations (see notes 52, 53, *infra*). Even though the tank was not meant to be safe for persons, once it became necessary to enter it, the service contractor had the obligation not to perform its work in a way which would make the vessel unseaworthy, i.e., unfit for men. Here a man was about to enter the wing tank. The tank was then not reasonably fit for the presence of men. It was not reasonably fit for the presence of men because the contractor had failed and continued to fail to take those steps which were required to make it reasonably safe — *i.e.*, test, ventilate or equip workers with the safety appliances needed (see note 53 *infra*).

To this extent, it was the action of the contractor which created the unseaworthy condition. But at least since *Alaska S.S. Co. v. Petterson*, 1954, 347 U.S. 396, 73 S.Ct. 601, 96 L.Ed. 499, 1954 A.M.C. 860, this has been enough.[38]

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[38]See Gutierrez v. Waterman S.S. Co., 1963, 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed.2d 297, 1963 A.M.C. 1649; Weyerhaeuser S.S. Co. v. Nacirema Co., 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491, 1957 A.M.C. 645. See also, Italia Societa v. Oregon Stevedoring Co., 1964, 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732, 1964 A.M.C. 1075; Ferrante v. Swedish American Lines, 3 Cir.,

But so typical of this Tinker-to-Evers-to-Chance[39] struggle there is an instinctive reflex by each side. Thus, the Shipowner, conceding with no enthusiasm that an independent contractor can be the instrument by which the vessel becomes unseaworthy to thereby launch unlimited liability against the ship (and hence her owner) asserts that there must be a time, sequential limitation, otherwise the contractor's conduct creates "instant unseaworthiness" as to which our subsequent *Antoine* and *Robichaux*[40] cases deny vessel liability. With like simplicity, the argument of the claimants merely anticipated in point of time that which can now be characterized in terms of *Mascuilli*[41] even though it has come out since the decision below. The *Mascuilli* theory is also one of extravagantly simple absolutes. It is the direct one that *Mascuilli*

1964, 331 F.2d 571, 1964 A.M.C. 2268, *cert. denied*, 379 U.S. 801, 85 S.Ct. 10, 13 L.Ed.2d 20; Thompson v. Calmar S.S. Corp., 3 Cir., 1964, 331 F.2d 657, 1964 A.M.C. 2249, *cert. denied*, 379 U.S. 913, 85 S.Ct. 259, 13 L.Ed.2d 184; Blassingill v. Waterman S.S. Corp., 9 Cir., 1964, 336 F.2d 367, 1964 A.M.C. 1932: Bue, Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I, 4 Hous. L. Rev. 350, 397-99 (1966).

[39]United States v. Seckinger, 5 Cir., 1969, —— F.2d ——, —— [No. 23432, Feb. 28, 1969, slip opinion at 14].

[40]Antoine v. Lake Charles Stevedores, Inc., 5 Cir., 1967, 376 F.2d 443, *cert. denied*, 389 U.S. 869, 88 S.Ct. 145, 19 L.Ed.2d 146; Robichaux v. Kerr McGee Oil Indus., Inc., 5 Cir., 1967, 376 F.2d 447. To these should be added Taylor v. S.S. Helen Lykes, 5 Cir., 1968, —— F.2d —— [No. 25101, Oct. 31, 1968] affirming E.D. La., 1967, 268 F. Supp. 932, involving a Yaka seaman-longshoreman's action against his employer's vessel. See also Note, Operational Negligence of Longshoreman Occurring at Moment of Injury to Co-Worker Does Not Render Vessel Unseaworthy, 5 Hous. L. Rev. 371 (1967). *Cf.* Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 A.M.C. 1503.

[41]Mascuilli v. United States, 1967, 387 U.S. 237, 87 S.Ct. 1705, 18 L.Ed.2d 743, 1967 A.M.C. 1702.

now means to affirm that "instant unseaworthiness" resulting from the "operational negligence" of the contractor at the very moment of injury subjects the ship to the absolute unseaworthiness liability.

We think neither of these extremes is warranted here. We agree, of course, that in *Antoine* and *Robichaux*, this Court rejected categorically the notion of "instant unseaworthiness". But that is of no help to the Shipowner here since the contractor's negligence extended over an appreciable period of time. On the other hand, the claimants' efforts to circumvent altogether a time factor on the basis of *Mascuilli* are equally wanting.[42]

With deference to our brothers in the Fourth Circuit we decline to follow their holding in *Satchell*[43] and that written for the panel by Judge Sobeloff in *Venable*[44] that *Mascuilli* rejects out of hand that so-called "operational negligence" defense to thereby impose absolute liability for the resulting "instant unseaworthiness".[45]

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[42]This question is presented directly in several cases, perhaps obliquely in some, now pending before other panels of this Court. See Luckenbach Overseas Corp. v. Usner, No. 25344; Wilson v. Societa Italiana de Armamento, No. 25890; Duncan v. Transeastern Shipping Corp., No. 25672; Patterson v. Humble Oil & Refining Co., No. 26365.

[43]Satchell v. Svenska Ostasiatiska Kompaniet, 4 Cir., 1967, 385 F.2d 76.

[44]Venable v. A/S Det Forenede Dampskibsselskab, 4 Cir., 1968, 399 F.2d 347.

[45]The unrevealing per curiam opinion of the full court on rehearing en banc, 4 Cir., 1968, 399 F.2d 355, may be the enigma wrapped in mystery. Although the order as published does not so reflect, direct communication with the Clerk of that Court confirms that the order was signed by the full Court.

This means that we part company at the same time with our distinguished brothers of the Second Circuit if — and the if can be a big one — the concurring opinion of Judge Leonard P. Moore on rehearing in *Candiano* and *Alexander*[46] speaks for the Court in the views which indicate that close analysis of intra-circuit undulations, aberrations and enigmas, of his own and other (including the Fifth) Circuits had led him to substantial second thoughts about "instant unseaworthiness" and *Mascuilli*.

A number of beacons chart the course in this direction. Foremost, perhaps, is the unlikelihood of the Supreme Court undertaking to make such a sweeping choice in the heavy seas of conflict by such an unilluminating pronouncement. Next, examining the only cases cited — *Mahnich*[47] and *Crumady*[48] — likewise reveals no intrinsic evidence of any such sweeping purpose. As for *Mahnich*, it was an early forerunner of what few could then expect would shortly be let loose by *Sieracki*[49] that merely held that it was the ship or her equipment being used, not the negligence of crew members in selecting the faulty from the good, which determined unseaworthiness. As for *Crumady*, its citation was an indication of precision, not generali-

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[46]Candiano v. Moore-McCormack Lines, Inc., 2 Cir., 1967, 386 F.2d 444, on petition for rehearing of 382 F.2d 961, 1967 A.M.C. 2312; Alexander v. Bethlehem Steel Corp., 2 Cir., 1967, 382 F.2d 963, 1967 A.M.C. 2324.

[47]Mahnich v. Southern S.S. Co., 1944, 321 U.S. 96, 64 S.Ct. 96, 88 L.Ed. 561, 1944 A.M.C. 1.

[48]Crumady v. The Joachim Hendrik Fisser, 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413, 1959 A.M.C. 580.

[49]Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, 1946 A.M.C. 698.

zation since in both *Crumady* and *Mascuilli* the injury resulted from the failure of the safety circuit breaker devices to work properly either from deficiencies or prior improper setting.

Of course nothing we say about what the Supreme Court said or thought it said can add much to what was said or what it will say it said. How we have divined it may be rejected by an expansive analysis of why the cryptic deliverance of *Mascuilli* was the message from Delphi in the words of perhaps latter-day spokesmen, that under the law "the very finding of operational negligence is a simultaneous finding of unseaworthiness — [since the] — alchemy is instantaneous."[30]

The result is that we adhere to *Antoine* and *Robichaux*, but faithful to them we find the ample facts on which to predicate unseaworthiness resulting from the negligence by the contractor in the performance of its work.

The decree against the Shipowner was therefore correct.

APPENDIX D

ORDER GRANTING INTERLOCUTORY APPEAL

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Misc. No. 856

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.,

Petitioners,

versus

JOSEPH CHARLES USNER,

Respondent

On Application for Leave to Appeal from an Interlocutory Order

Before BROWN, Chief Judge, COLEMAN and SIMPSON, Circuit Judges.

BY THE COURT:

Leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana, entered on August 11, 1967, in this cause be, and the same is hereby GRANTED.

(ORIGINAL FILED - October 12, 1967)

APPENDIX E

ORDER AMENDING ORDER OF AUGUST 11, 1967

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Joseph Charles Usner	CIVIL ACTION
versus	No. 15531
LUCKENBACH STEAMSHIP CO., INC., ET AL	SECTION F

In view of the fact that the order rendered herein on August 11, 1967 denying the motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc. for summary judgment involves a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense,

IT IS ORDERED that the order rendered herein on August 11, 1967 be amended to show that there exists a controlling question of law, to wit, the validity of the doctrine of operational negligence as a defense in this cause and as to which defense there is a substantial ground for difference of opinion and accordingly, an immediate appeal may materially advance the ultimate termination of the litigation.

New Orleans, Louisiana, August 30, 1967.

(Signed) LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

APPENDIX F

ORDER GRANTING MOTION OF LUCKENBACH and ISTHMIAN LINES FOR AMENDED ORDER OF AUGUST 11, 1967

MINUTE ENTRY:
AUGUST 30, 1967
MITCHELL, J.

JOSEPH CHARLES USNER — SECTION "F"

versus — NO. 15531

LUCKENBACH STEAMSHIP COMPANY, INC., et al — CIVIL ACTION

This cause came on this day for hearing on motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order.

PRESENT: Evangeline M. Vavrick,
Attorney for Plaintiff

George B. Matthews, Esq.
Attorney for Union Barge Line Corp.

M. D. Yager, Esq.
Attorney for Luckenbach Overseas Corp.
Isthmian Lines

IT IS ORDERED BY THE COURT that motion of Luckenbach Overseas Corporation and Isthmian Lines, Inc., Defendants, for rehearing or, in the alternative, to amend order, be, and the same is hereby, GRANTED, insofar as the Order of August 11, 1967 be amended.

APPENDIX G

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

MINUTE ENTRY
MITCHELL, J.
AUGUST 11, 1967

JOSEPH CHARLES USNER	CIVIL ACTION
VERSUS	NO. 15531
LUCKENBACH STEAMSHIP CO., INC., ET AL	SECTION F

This cause came on for hearing on another day on motion of the defendant, Luckenbach Overseas Corporation, erroneously designated Luckenbach Steamship Co., Inc., and Isthmian Lines, Inc. for a summary judgment in their favor, dismissing the complaint against them.

PRESENT:

Evangeline M. Vavrick
Attorney for plaintiff

M. D. Yager, Esq.
Attorney for defendants

IT IS ORDERED that the motion of the defendants, Luckenbach Overseas Corporation and Isthmian Lines, Inc., is denied.